a

GENISYS INTEGRATED ENGINEERS PTE LTD

v.

UEM GENISYS SDN BHD & ORS (NO 2)

b

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI JC
[SUIT NO: D9-26-43-2000]
19 JANUARY 2001

c ***CIVIL PROCEDURE:*** *Appeal - Notice of - Notice did not state order sought to be obtained contrary to Form 114 and O. 56 r. 1(2) Rules of the High Court 1980 - Whether strict adherence to rules required - Whether court has discretion to rectify defect - Rules of the High Court 1980, Form 114, O. 56 r. 1(2)*

d The petitioner filed an appeal to set aside the decision of the senior assistant registrar ('SAR') whereby the petitioner was ordered to deposit a sum as security for costs in favour of the first to the fourth respondents.

The respondents raised a preliminary objection that the petitioner's notice of appeal in encl. 38 failed to comply with the requirements under Form 114
e and O. 56 r. 1(2) of the Rules of the High Court 1980 ('RHC'). They contended that encl. 38 did not state "the order sought to be obtained".

The petitioner rebutted the above and submitted that if there was non-compliance of the said rules, the court had the discretion to rectify the defect
f under O. 2 r. 1 RHC.

Held:

[1] The petitioner must comply with two mandatory requirements under Form 114 of the RHC. Firstly, to state in full the order appealed against and
g secondly, to state the order sought to be obtained. In this instance, the plaintiff did not state the order sought to be obtained. As such, the court was in the dark as to what the petitioner actually required. Such non-compliance did prejudice and mislead the respondents and the court.

[2] On the question of exercising the court's discretion under O. 2 r. 1 of
h the RHC, there must be strong justification why the petitioner could not comply with the requirements. The court found that the non-compliance was serious and prejudicial to the respondents. Thus, this was not a proper case to exercise the court's discretion to cure the defect.

i *[Notice of appeal set aside.]*

Case(s) referred to:
Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(foll)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 1 MLJ 41 ***(foll)***
Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 CLJ 1634 ***(refd)***
TR Hamzah & Yeong Sdn Bhd v. Lazar Sdn Bhd [1984] 1 CLJ 303 ***(refd)***
Yu Oi Young & Anor v. Hu Toong & Ors [1977] 1 MLJ 120 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 16
Rules of the High Court 1980, Form 114, O. 1 r. 7, O. 2 r. 1, O. 56 r. 1(2)

For the petitioner - Loh Siew Cheang (ET See with him); M/s Cheang & Ariff
For the 1st, 2nd, 3rd, 4th respondents - Mohd Hafarizam Harun; M/s Rashid & Lee

Reported by Raja Vishnu

JUDGMENT

Ramly Ali JC:

Facts Of The Case

The petitioner filed an appeal to the judge-in-chambers against the decision on the learned senior assistant registrar made on 27 November 2000 whereby the petitioner was ordered to deposit a sum of RM20,000, as security for cost in favour of the 1st – 4th respondents, into court within 30 days from the date of the order. The said appeal was fixed for hearing on 17 January 2001.

The counsel for the 1st – 4th respondents had on that date, raised a preliminary objection that the petitioner's notice of appeal dated 1 December 2000 (encl. 38) had failed to comply with the requirements under Form 114 and O. 56 r. 1(2) of the Rules of the High Court 1980 (RHC) and thus should be set aside with costs. The counsel contended that the said encl. 38 had not stated "the order sought to be obtained" as required by the second part Form 114 (RHC). To support his contentions, the counsel for the 1st – 4th respondents cited the rulings in *Dato' Wong Gek Meng v. Pathmanathan a/l Mylvaganam & Ors* [1998] 1 CLJ 625 as an authority.

The counsel for the petitioner, on the other hand, submitted that the said notice of appeal (encl. 38) had complied with the relevant provisions of the RHC and Form 114. He contended that the order that the petitioner is seeking from the court is to set-aside the decision of the SAR dated 27 November 2000, which is spelt out in encl. 38. He further argued that the rulings in *Dato' Wong Gek Meng*'s case do not apply to the present case as the facts are different. Finally, the counsel submitted, if at all, encl. 38 does not comply with Form 114 RHC, the court has the discretion under O. 2 r. 1 RHC to rectify and cure it, as the respondent are not prejudiced by the irregularity.

Findings Of The Court

Order 56 Rule 1(2) RHC provides that:

> (2) The appeal **shall** be brought by serving on every other party to the proceedings in which the judgment, order of decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice

For clarity, Form 114 RHC is reproduced below:

> No. 114
> NOTICE OF APPEAL TO JUDGE IN CHAMBERS (O. 56 r. 1)
> (Title as in Action)
>
> Take notice, that the abovenamed Plaintiff (or defendant) intends to appeal against the decision of the Registrar given on the ... day of ..., 19 ... ordering (or refusing to order) **(state in full the order appealed against)**.
>
> Dated the ... Day of ..., 19 ...
>
> ...
> Solicitor for the ...
>
> And further take notice, that you are required to attend before the Judge in Chambers on ... the day of ..., 19 ... at ... m, on hearing of an application by the said plaintiff (or defendant), that (state the order sought to be obtained).
>
> Dated the ... day of ... 19 ...
>
> (seal)
>
> ...
> Registrar
>
> To: ...

At this stage I must stress that all the forms in appendix A (RHC), having been prescribed by the relevant Rules thereunder, have the same force of law as the Rules of Courts themselves as provided under s. 16 of the Courts of Judicature Act 1964 (Act 91).

The word "shall" as used in O. 56 r. 1(2) RHC indicate the mandatory nature of the requirement. In *Yu Oi Young & Anor v. Hu Toong & Ors* [1977] 1 MLJ 120, Chang Min Tat J, held that the rules and prescribed forms thereunder are primarily to be followed unless departure justifies it. This case was cited with approval by the Federal Court in *TR Hamzah & Yeong Sdn Bhd v. Lazar Sdn Bhd* [1984] 1 CLJ 303.

In this context, I fully agree with Abdul Malik Ishak J, in *Dato' Wong Gek Men's case (supra)*, when he said –

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed prima facie as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multimedia Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

In that case, the court was dealing with the same issue as in our present case, *ie*, non-compliance with Form 114 RHC (whereby the court had struck out the notice of appeal with costs, for such non-compliance).

> I would also like to refer to Order 1 Rule 7 RHC which says – "The Forms in Appendix A **shall** be used where applicable with such variation as the circumstance of the particular case require.

Again, the word "shall" used thereunder indicates the mandatory nature of requirement. Variations can only be accepted as the circumstance of the particular case require.

Based on the above authorities, I am of the opinion that an appellant must comply with the two mandatory requirements under Form 114 RHC –

i) to state in full the order appealed against; and

ii) to state the order sought to be obtained.

In our present case, the contents of encl. 38 is set out below –

(Title as in action)

NOTIS RAYUAN KEPADA HAKIM DALAM KAMAR

> AMBIL PERHATIAN bahawa Pempetisyen yang dinamakan di atas berniat untuk merayu terhadap keputusan Penolong Kanan Pendaftar yang diberikan pada 27.11.2000 yang memerintahkan Pempetisyen mendepositkan RM20,000 sebagai jaminan kos kepada Responden Pertama – Responden Ke-4 di dalam Mahkamah dalam tempoh 30 hari dan tarikh Perintah tersebut.
>
> Bertarikh pada 01 haribulan Disember, 2000
>
> t.t.
> Tetuan Cheang & Ariff
> Peguamcara Pempetisyen

DAN AMBIL PERHATIAN selanjutnya bahawa kamu dikehendaki untuk menghadiri di hadapan Hakim Dalam Kamar pada ... haribulan ... 2000, pukul 9.00am untuk perbicaraan rayuan Pempetisyen tersebut.

Bertarikh pada 01 haribulan Disember, 2000

t.t.
...
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur.

Kepada: Responden Pertama – Responden Ke 4 dan /atau
Peguamcaranya
Tetuan Rashid & Lee
Peguambela dan Peguamcara
Level 12 & 13, Menara Milenuim
8 Jalan Damanlela
Damansara Heights
50490 Kuala Lumpur.

The relevant part of encl. 38 which is the subject matter of this preliminary objection relates to the second part of the form which was signed by the learned senior assistant registrar. It is clear that the petitioner had complied with the 1st requirement, ie, to state in full the order appealed against, but, there is nothing in encl. 38 to show that the petitioner had complied with the 2nd requirement, ie, to state the order sought to be obtained. What is the order that the petitioner is seeking from the court? We know that the petitioner is appealing against the decision of the learned SAR made on 27 November 2000 (from the 1st part of encl. 38), but we are in the dark as to what is the nature of the order the petitioner sought to obtain. In an appeal, an appellant may ask for the whole decision to be set aside; or part of the decision to be set aside; if part of the decision, which part?; or certain part of the decision to be modified or amended. Unfortunately, in our present case, we are not sure what the petitioner actually want. The petitioner had failed to state the order sought to be obtained. Both the counsel for respondents and the court are in the dark. The counsel for the respondents is obviously prejudiced for not being able to argue and to object the said appeal. The court is not sure as to what type of order to be granted in the event the petitioner succeed in arguing the appeal. The counsel for the petitioner said that the petitioner wants the order made by the learned SAR to be set aside. If that is so, the petitioner must state that, that is the order sought. Such non-compliance did prejudice and mislead the counsel for the respondents and the court as to what order to be granted.

Order 1 r. 7 RHC make it mandatory for litigants to use the forms in appendix A whose applicable with such variation as the circumstances of each particulars case require. In our present case, there is nothing to show that the circumstance of the case require the petitioner not to comply with the relevant requirement, *ie*, to state the order sought to be obtained in encl. 38. There's no reason given as to why the petitioner cannot fulfil the said requirement.

On the question of exercising the court's discretion under O. 2 r. 1 RHC, to cure the said non-compliance, as requested by the counsel for the petitioner, I must say that O. 2 r. 1 RHC is not meant to a carte blanche cover to overlook all forms of irregularities without appreciating that the said Rules gives the discretion to the court to allow or disallow application made thereunder, depending on the circumstance of each particular case. Such powers under O. 2 r. 1 are actually "exception to the general rule". There must be strong justification why litigants cannot comply with the requirements, in order for the court to exercise such powers. The powers should be exercised sparingly. A mere omission or oversight on part of the litigants or counsels should not be an excuse to invoke those powers. In *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 MLJ 41, Ajaib Singh J had ruled that the mistake or oversight by the solicitor for the appellant did not constitute a valid or sufficient ground on which the court could exercise its discretion in favour of the appellant. He went on to say that –

> The rules are there to be followed and they may be relaxed in the interest of justice only if sufficient cause is shown. The procedural handmaid cannot, without good reason, come to the rescue of slow-moving litigants or their legal advises.

In another case, *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 CLJ 1634, the Singapore Court of Appeal applied a strict approach when it said –

> Notwithstanding the very wide power given to the court to remedy non-compliance with the rules ... there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under rule 1 to remedy it.

In our present case, I find that the non-compliance is serious and prejudicial to the respondents. As such for the interest of justice, I feel that this is not a proper case for this court to exercise its discretion under O. 2 r. 1 RHC to cure the defect.

Decision

Based on the above findings, I am satisfied that the respondents' preliminary objection should be allowed. Having said so, I am now making an order to set aside encl. 38 for failure to comply with Form 114 and O. 56 r. 1 RHC, with cost.